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In the

SUPREME COURT of the UNITED STATES

October Term, 1965

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, ET AL.,
v.
CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD CO., ET AL.,

No. 69

HARDIN, ETC., ET AL.,
v.
CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD CO., ET AL.,

No. 71

Brief of State of Wisconsin Amicus Curiae

BRONSON C. LA FOLLETTE
Attorney General

BEATRICE LAMPERT
Assistant Attorney General

Attorneys for State of Wisconsin as amicus curiae

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QUESTION PRESENTED

Did Congress intend by Public Law 88-108, which provided for arbitration of a specific labor dispute, to preempt regulation of train crews, so as to exclude all state legislation on the subject?

POSITION OF THE STATE OF WISCONSIN, AMICUS CURIAE

The State of Wisconsin respectfully represents to the court that Congress did not, either by Public Law 88-108 or by any other legislation, preclude states from regulating railroad train crews so as to serve public safety as local conditions may require.

Such position has been affirmatively established by action of all three departments of Wisconsin's state government.

The legislative position was evidenced by enactment of secs. 192.25 (2), (4) and (4a), Wisconsin Statutes, which were amended by Ch. 299, Wisconsin Laws of 1959, to extend the full-crew laws to trains "propelled by any form of energy." The executive position was evidenced by approval of the law.

The position of the judicial branch was stated by Wisconsin's supreme court on June 1, 1965 in *Chicago & N. W. R. Co. v. La Follette*, 27 Wis. (2d) 505, 135 N. W. (2d) 269. The decision was responsive to challenges of the state law based, in part, on one of the decisions here under appeal, i.e., *Chicago, Rock Island & Pac. R. Co. v. Hardin*, 239 F. Supp. 1.

The Supreme Court of Wisconsin recognizes that state regulation of train crews must not infringe upon rights protected by the Fourteenth Amendment. Accordingly, the matter in which the above cited decision was given was remanded to a lower court for trial of other constitutional issues.

This brief is limited to the proposition that states have not been ousted by Congressional legislation of their traditional power to regulate train crews in the interest of public safety, when the state regulations do not otherwise violate constitutional rights.

ARGUMENT

I.

THE SUPREME COURT OF WISCONSIN ISSUED AN OPINION JUNE 1, 1965, THAT CONGRESS HAS NOT OUSTED STATES OF JURISDICTION TO REGULATE TRAIN CREWS

The Supreme Court of Wisconsin handed down its decision on June 1, 1965, in *Chicago & N. W. R. Co. v. La Follette,* 27 Wis. (2d) 505, 512-513, 516-520, 135 N. W. (2d) 269. The court's language best speaks for itself:

> "* * * before pre-emption will be found to exist, that intention of Congress must be clearly manifested. *Minneapolis, St. P. & S. S. M. R. Co. v. Railroad Comm.* (1924), 183 Wis. 47, 197 N. W. 352; *Florida Lime & Avocado Growers v. Paul* (1963), 373 U. S. 132, 83 Sup. Ct. 1210, 10 L. Ed. (2d) 248, rehearing denied 374 U. S. 858, 83 Sup. Ct. 1861, 10 L. Ed. (2d) 1082; *International Union v. Wisconsin Employment Relations Board* (1949), 336 U. S. 245, 69 Sup. Ct. 516, 93 L. Ed. 651, rehearing denied 336 U. S. 970, 69 Sup. Ct. 935, 93 L. Ed. 1121; *Missouri Pacific R. Co. v. Norwood* (1931), 283 U. S. 249, 51 Sup. Ct. 458, 75 L. Ed. 1010; *Chicago, Rock Island & P. R. Co. v. Hardin, supra; New York Central R. Co. v. Lefkowitz, supra.* The ultimate question is: Does the application of state

law frustrate the purpose of the federal legislation? *Teamsters Union v. Morton* (1964), 377 U. S. 252, 84 Sup. Ct. 1253, 12 L. Ed. (2d) 280. See also *Teamsters Union v. Oliver* (1959), 358 U. S. 283, 79 Sup. Ct. 297, 3 L. Ed. (2d) 312.

"The clear manifestation of a purpose to pre-empt state legislation should be considered in light of the rule that the states have considerable latitude respecting safety regulation of interstate commerce in the exercise of their police powers. Thus, it was said in *Terminal Asso. v. Trainmen* (1943), 318 U. S. 1, 8, 63 Sup. Ct. 420, 87 L. Ed. 571:

"'As to both classes of runs, the effect of the order is in some measure to retard and increase the cost of movements in interstate commerce. This is not to say, however, that the order is necessarily invalid. In the absence of controlling federal legislation this Court has sustained a wide variety of state regulations of railroad trains moving in interstate commerce having such effect.'"

* * *

[Here follows the text of the state law and of Public Law 88-108, 77 Stat. 132, 45 U. S. C. A. § 157 (Supp.)]

* * *

"For the reasons which follow, we conclude the state full-crew laws have not been pre-empted.

"The following appears in 109 Congressional Record 16122 (Aug. 28, 1963):

'Mr. Harris. This issue was raised in the course of the hearings before the committee. Questions were asked of the various people representing management and the labor industry and witnesses representing the

labor brotherhoods, the employees' representatives, and the Secretary of Labor. It was made rather clear in the course of the hearings that it would in no way affect the provisions of State laws. The committee in executive session discussed the question and concluded that it was not the intent of the committee in any way to affect State laws. On page 14 of the committee report we included, in order that this history might be made, this language:

'The committee does not intend that any award made under this section may supersede or modify any State law relating to the manning of trains.

'In a footnote on page 112 of the hearings before the committee on House Joint Resolution 565, the original bill, there is a discussion of the legal basis for State "full-crew" laws, and a citation to several Supreme Court decisions upholding these laws, such as *Missouri Pacific R. R. Co. v. Norwood* (283 U. S. 249).

'Therefore, since this bill does not mention the subject of State laws, and since, as the committee report shows, we do not intend to affect these laws, I am confident they are not affected by the bill.

'I think that is about as clear as we can make it.'

"The award of the arbitration board is as much a part of the law of the land as is the statute. The statute commands a study and award be made in respect to the fireman issue. That such a study and award were made does not *ipso facto* pre-empt state law. Note that the statute and the award expire by the terms of the statute.

"The award itself provides:

'II. Use of Firemen (Helpers) on Other Than Steam Power

'Part A—Saving Clause

'A (1) All agreements, rules, regulations, interpretations and practices, however established, with respect to the employment of firemen (helpers) shall continue undisturbed except as modified by the terms of this Award.'

"The award makes reference to the matter of safety. The matter of crew consist of trains and engines was left for local negotiation. Guidelines were set forth, one of which is, 'State, county, or municipal regulations applicable with respect to highway, street, road, railroad, or other crossings or intersections.' This guideline is not squarely on point but it does reflect appreciation of local safety rules.

"The opinion of the neutral members of the arbitration board states, at page 4:

'The provisions of our award are explained in general terms in this opinion, without reference to certain refinements spelled out in the award. In the event of any inadvertent conflict between the explanation given in this opinion and the precise language of the award, the latter is, of course, intended to govern.'

"The award is silent on the question of preemption of the full-crew laws. The opinion should be read as explanatory of the award.

"The opinion rejected the idea that there will be a wholesale elimination of personnel from the jobs which have been terminated. Several reasons were given. One is that the award provides for gradual elimination of the employees. And, further, '. . . a number of States, by law or administrative regulation, require the use of firemen in road freight or yard service.'

"With respect to the crew-consist issue, the opinion states:

'It has been explained earlier in this opinion that the size of road and yard crews in other than engine service has never been the subject of a national rule in the railroad industry. The consist of these crews, involving primarily helpers and road brakemen, has been determined generally by local rules, practices, *state full crew laws,* or regulations issued by State Public Utility Commissions. Only a relatively few carriers are unrestricted in determining the size of crews, and it is doubtful if even they have complete freedom to change crew size as they wish. It is clear from the evidence before us that the myriad of local arrangements has led to numerous inconsistencies in the manning of crews. It is equally clear that some of the existing rules, originating as they did more than a half-century ago, are anachronistic and do not reflect the present state of railroad technology and operating conditions.' (Emphasis added.)

"The board was directed to pass directly on the firemen and train-crew issues. *Brotherhood of Locomotive Firemen and Enginemen v. Chicago, B. & Q. R. Co., supra.* It did not, however, pre-empt the field, as shown by the award and the opinion of the neutral members.

"There is a split of authority on the pre-emption question.

"In *Florida Lime & Avocado Growers v. Paul, supra,* it was said that if physical compliance with both the state and federal law is impossible, state law is pre-empted. Such is not the case here. In the *Florida Lime & Avocado Growers Case* the court stated the standards for determining when there is pre-emption. Does state law operate as an 'obstacle to the accom-

plishment and execution of the full purposes and objectives of Congress?' The court said at page 142:

'The test of whether both federal and state regulations may operate, or the state regulation must give way, is whether both regulations can be enforced without impairing the federal superintendence of the field, not whether they are aimed at similar or different objectives.'

"There is no pre-emption, as the court said:

'. . . in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained.'

"The well-established rule that states may regulate in this area of safety, the fact that Public Law 88-108 and the award do not clearly manifest an intention to occupy this field warrant the conclusion that our full-crew laws have not been pre-empted. Whether such laws can withstand the challenge from other directions —and the sufficiency of such a challenge—are the next points to be considered."

II.

CONGRESS HAS INDICATED NO INTENT TO SUPERSEDE THE DETERMINATIONS OF THE UNITED STATES SUPREME COURT THAT REGULATION OF TRAIN CREWS IS A PROPER FIELD FOR STATE ACTION

A. Federal Law Prior to Enactment of Public Law 88-108 Established That Regulation of Train Crews Was within the Power of States

The last of the three cases in which the United States Supreme Court expressly sustained the Arkansas full-crew laws against challenges involving the Commerce Clause of the Constitution was *Missouri Pacific R. Co. v. Norwood* (1931), 283 U. S. 249, 256, 75 L. ed. 1010, 51 S. Ct. 458. The court there indicated that no federal regulation enacted prior to 1931 had ousted states of jurisdiction. The court said:

> "Has Congress prescribed, or authorized the Interstate Commerce Commission to regulate, the number of brakemen to be employed for the operation of freight trains or the number of helpers to be included in switching crews?
>
> "In the absence of a clearly expressed purpose so to do Congress will not be held to have intended to prevent the exertion of the police power of the states for the regulation of the number of men to be employed in such crews. *Reid v. Colorado,* 187 U. S. 137, 148. *Savage v. Jones,* 225 U. S. 501, 533. *Napier v. Atlantic Coast Line,* 272 U. S. 605, 611. * * *" (*loc. cit.* 283 U. S. 256)

The ruling of the foregoing case was impliedly approved in 1945 in *Southern Pacific Co. v. Arizona* (1945), 325 U. S. 761, 782, 89 L. ed. 1915, 65 S. Ct. 1515, in which the full-crew laws were distinguished from the law there invalidated.

B. Legislative History of Public Law 88-108 Shows that Congress Did Not Intend to Oust States of Jurisdiction

The only Congressional action since the year 1931 which might be claimed to bring under federal control the subject of the composition of train crews is the resolution adopted by Congress in August 1963 known as Public Law 88-108, which was adopted for the purpose of preventing a nation-wide railroad strike.

The opinion of the two judges who concurred in the majority opinion in 239 F. Supp. 1, which is here on appeal, seems to have been influenced by what they believed the law *should* be rather than by indications of Congressional intent.

Where the words of a Congressional enactment do not of themselves preclude state action, this court has avoided reading such words into the enactment.

Where Congressional intent has been ascertainable from legislative history, this court has resorted to such history as it did, for example, in *Charles Bowd Box Co. v. Courtney* (1962), 368 U. S. 502, 7 L. ed. (2d) 483, 82 S. Ct. 519.

The committee report quoted in *Chicago & N. W. R. Co. v. La Follette*, 27 Wis. (2d) 505, 135 N. W. (2d) 269, furnishes affirmative proof of Congressional intent that states should retain their traditional authority to regulate train crews.

Further, in the hearings before the committee, the Secretary of Labor cited the decision of the Supreme Court of the United States in the latest of the Arkansas cases (*Missouri Pacific R. Co. v. Norwood*, 283 U. S. 249) and said:

> "The intention, Mr. Moss, would be that the state railroad full crew laws would not be affected. * * * It would be the intention reflected here that the issuance of an interim ruling, subject to termination in a time period or at the agreement of the parties, would not have the effect of affecting any state full crew law."
>
> Hearings, page 78.

C. The Purpose of Public Law 88-108 Does Not Require That States Be Ousted of Regulatory Power

The Congressional enactment which is urged as ousting states of jurisdiction to regulate train crews was not concerned primarily with the question of safety, but with a temporary solution of a labor dispute. This aspect is discussed in the decision of the New York Supreme Court for Westchester County in *The New York Central Railroad Company v. Louis J. Lefkowitz* (1965), 259 N. Y. S. (2d) 76, 111-112, from which the following excerpts are taken:

"The parties to the dispute were free to settle it by their own agreement if they could, and the resulting conditions could be as good, or as bad, insofar as safety and working conditions were concerned as the parties should choose to make them. What Congress was concerned with was the settlement of a dispute in the interest of the national welfare, which the parties had been unable to settle by negotiation and agreement, and it seems clear that Congress did not intend to enter the crew consist field to any greater extent than was necessary to accomplish that purpose. The objectives were to be achieved, as stated in the preamble to the joint resolution, in a manner which 'preserves and prefers solutions reached through collective bargaining, * * *.' Presumably, for that purpose, and to encourage further bargaining to bring about a permanent solution of the problem, if possible, by agreement, the public law further provided that the relief to be obtained through arbitration should be effective for a limited time. The award was to continue in force for a period not to exceed two years, unless the parties should otherwise agree.

"That Congress did not contemplate that the full crew laws should be affected seems evident from the provisions of the statute. The fact that the dispute was to be settled by agreement, if possible, does not appear to be consistent with a purpose to supersede the state laws. It does not seem likely that Congress intended that laws enacted under the constitutionally protected police powers of the states might be set aside by agreement between the railroads and their employees. There is, of course, ample authority which establishes that collective bargaining agreements made pursuant to federal law bear 'the imprimatur of the federal law upon them,' and cannot be vitiated or made

illegal by state laws. (See *Railway Employees' Dept. v. Hanson*, 351 U. S. 225; *California v. Taylor*, 353 U. S. 553, *supra; Local 24 of the International Brotherhood of Teamsters v. Oliver*, 358 U. S. 283.

"No case has been cited, or discovered, however, which applies that principle against state laws relating to minimum requirements of health or safety, nor do I believe that it may properly be so applied, in the absence of a clearly stated Congressional purpose to effect such a result. Indeed, in the *Oliver* case (358 U. S. 283, *supra*) in sustaining a collective bargaining agreement prescribing a wage scale for truck drivers, as against a state statute, the court said:

> 'We have not here a case of collective bargaining agreement in conflict with a local health or safety regulation; the conflict here is between the federally sanctioned agreement and state policy which seeks specifically to adjust relationships in in the world of commerce.' (p. 297) (See also *Missouri Pac. R. Co. v. Norwood*, 283 U. S. 249, *supra*.)

* * *

"In recommending the passage of the Joint Resolution, The Committee on Commerce, in the Senate, referred to the resolution as one designed to resolve the current dispute, and stated that it was not, and could not conceivably be considered as a precedent for any other labor management dispute. It was, the Committee stated, 'what it purports to be—a one shot solution through legislative means to a situation which imperiled, beyond question the economy and security of the entire nation.' "

III.

THE ENFORCEMENT OF STATE FULL-CREW LAWS WILL SERVE THE NATIONAL INTEREST

If Congress had all the information it needed to enact uniform regulation throughout the nation, it would have enacted a statute making clear its intent to occupy the field and so to preclude states from legislating. Instead, it provided only for a *temporary* solution of the difference of the parties to the labor dispute. The arbitration award made pursuant to the Congressional enactment provided for establishment of a national joint board "with responsibility for making an intensive and continuing study of the experience in road freight and yard service with and without the employment of firemen (helpers) during the period this award remains in effect."

Surely, when both Congress and the arbitration board recognized the need of further study, it must have been recognized that a permanent solution needed all the information which could be obtained under varying local conditions and varying regulations. What better source of information could exist than fifty states whose varying conditions of population, climate, terrain, and the like are being dealt with by the regulations which local officials have found to be best adapted to local needs?

Respectfully submitted,

BRONSON C. LA FOLLETTE
Attorney General
BEATRICE LAMPERT
Assistant Attorney General

Attorneys for State of Wisconsin as amicus curiae